

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY SHINKLE

Claimant

VS.

EATON CORPORATION

Respondent

AND

SELF INSURED

Insurance Carrier

Docket No. 189,546

ORDER

This application for review of a Preliminary Hearing Order entered by Administrative Law Judge George R. Robertson, dated October 14, 1994, comes on before the Workers Compensation Appeals Board at the request of the claimant.

ISSUES

The Administrative Law Judge denied claimant's request for medical treatment for alleged repetitive injuries to his left and right shoulders while working for the respondent from January 2, 1994 through the date of the Preliminary Hearing of October 14, 1994. The Administrative Law Judge denied the requested benefits finding that the claimant failed to establish his burden of proof. From this decision claimant requests review by the Appeals Board raising the single issue of whether the claimant sustained a personal injury by accident arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the entire record and for purposes of preliminary hearing, the Appeals Board finds as follows:

Jurisdiction to review a preliminary hearing order is granted the Appeals Board when the issue is raised as to whether the claimant's personal injury by accident arose out of and in the course of his employment. See K.S.A. 44-534a(a)(2).

The Administrative Law Judge found claimant had failed to establish that the nature of the injury complained of would result from the work performed by the claimant at below shoulder level. There is no question that the claimant in a workers compensation case has the burden to establish his right to compensation and prove the various conditions on which such rights depends. See K.S.A. 44-501(a). However, after a review of the evidentiary record contained in this case, the Appeals Board finds that the claimant has presented persuasive evidence through his own testimony and the testimony of John Tanksley, M.D., that establishes he has suffered repetitive use injuries to his left shoulder while performing his work activities for the respondent.

Claimant is currently employed by the respondent running a test stand. He performs his job duties by using both hands repetitively in reaching to put parts in the stand, taking parts out of the stand and assembling the parts. Claimant's shoulder first started being symptomatic about a year ago and the problems have persisted and remained at about the same level.

At the request of the claimant's attorney, claimant was examined and treated in reference to his left shoulder complaints by John A. Tanksley, M.D., an orthopedic surgeon in Hutchinson, Kansas, on May 3, 1994. The claimant gave a history of left shoulder problems over a six (6) month period relating the pain to his work activities. The claimant demonstrated his work activities to the doctor and the doctor described in range of motion terms that he abducts and externally rotates the left shoulder when picking up a very light part, placing it in the machine, tapping it closed and then pulling the handle. After a physical examination, Dr. Tanksley's diagnosis was impingement syndrome and possible torn rotator cuff of the left shoulder. During this visit the claimant was given an injection of cortisone and referred to physical therapy. However, the claimant has not returned for treatment and has not participated in the physical therapy program because the respondent has refused to authorize this medical treatment. It is Dr. Tanksley's opinion, within a reasonable degree of medical probability, that if the claimant performs his job duties as he demonstrated on a repetitive basis, that such activities would aggravate the impingement syndrome.

For preliminary hearing purposes, the evidence presented by the claimant is persuasive and establishes that the claimant has an impingement syndrome of the left shoulder which is being aggravated by his daily work activities. See Cox v. Ulysses Cooperative Oil and Supply Co., 218 Kan. 428, 544 P.2d 363 (1975).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge George R. Robertson, dated October 14, 1994, is reversed and an Order is entered by the Appeals Board finding the claimant did suffer a personal injury by accident arising out of and in the course of his employment with respondent. The Appeals Board further orders this case remanded to Administrative Law Judge George R. Robertson for appropriate findings based on the evidence contained in the preliminary hearing proceedings in regards to claimant's request for medical treatment for his left shoulder.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney at Law, Hutchinson, KS 67504-2977
 Edward D. Heath, Jr., Attorney at Law, Wichita, KS 67201-0095
 David G. Shriver, Attorney at Law, McPherson, KS 67460
 George R. Robertson, Administrative Law Judge
 George Gomez, Director